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No. 93-6047

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

BOBBY JOE WILLS,
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court has jurisdiction to review Wills' claims which were neither properly presented to nor addressed by the court below

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through the Attorney General of Texas, and files this Brief in Opposition.

OPINIONS BELOW

On May 5, 1993, in an unpublished opinion, the Texas Court of Criminal Appeals affirmed Wills' conviction. On June 16 1993, the Court of Criminal Appeals denied without written order Wills' motion for rehearing. The opinion and notation of denial of rehearing are attached to the petition as Appendices A and C.

JURISDICTION

Wills seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

[1] For clarity, the petitioner will be referred to as "Wills."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Wills bases his claims upon the Eighth and Fourteenth Amendments to the United States Constitution. Also implicated are the former provisions of the capital sentencing statute, Article 37.071 of the Texas Code of Criminal Procedure (amended effective September 1, 1991).

STATEMENT OF THE CASE

The state has lawful custody of Wills pursuant to a judgment and sentence of the 260th Judicial District Court of Orange County, Texas, in D-850134, styled *the State of Texas v. Bobby Joe Wills*. On March 27, 1985, Wills was indicted for the offense of capital murder of Judy Bracewell while in the course of committing and attempting to commit robbery.

The guilt-innocence phase of the trial began on May 9, 1985;. On May 14, 1985, the jury found Wills guilty of the capital offense. After hearing additional evidence in the punishment hearing, on May 16, 1985, the jury answered affirmatively the special issues submitted pursuant to Article 37.071 of the Texas Code Criminal Procedure (amended effective September 1, 1991). Consequently, the trial court assessed a death sentence in accordance with state law.

Wills appealed this conviction and sentence to the Texas Court of Criminal Appeals, which affirmed in an unpublished opinion on May 5, 1993. (Appendix B to the petition). On May 24, 1993, Wills filed a motion for rehearing, which was denied on June 16. 1993. (Appendices A & C to the petition).

SUMMARY OF ARGUMENT

Wills delineates two challenges to his sentence neither one of which was properly presented to or addressed by the Texas Court of Criminal Appeals. For this reason, the Court should deny certiorari jurisdiction.

REASONS FOR DENYING THE WRIT

I.

THE COURT DOES NOT HAVE JURISDICTION TO REVIEW WILLS' CLAIMS WHICH WERE NEITHER PROPERLY PRESENTED TO NOR ADDRESSED BY THE COURT BELOW.

Citing *Penry v. Lynaugh*, 492 U.S. 302 (1989), Wills claims that punishment phase jury instructions and special issues were inadequate to allow the jury to give effect to his mitigating evidence. This claim was not timely or properly raised in the Court of Criminal Appeals because, as Wills concedes, it was first presented in a motion for rehearing.[2] Moreover, in his motion for rehearing, Wills did no more than refer the Court of Criminal Appeals to *Penry* with a statement that his case "contained" the specific issues raised by Penry and should be reversed. The state court did not entertain the claim but denied rehearing. Consequently, it is not properly before the Court for review on writ of certiorari.

The cases are both legion and long-standing that the Court will not decide issues raised for the first time on petition for certiorari or appeal and that the Court will not decide federal questions not raised properly and decided in the court below. *E.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 410 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). To properly invoke the Court's jurisdiction, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919). "[W]hen 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987), *quoting Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (further citations omitted).

Moreover, raising a federal question for the first time in a motion for rehearing addressed to the highest state court is insufficient to invoke Supreme Court jurisdiction unless the court below actually entertains and expressly decides the question. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *see also Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932); *Forbes v. State Council*, 216 U.S. 396 (1910); *Simmerman v. Nebraska*, 116 U.S. 54 (1885). To merit Supreme Court review, the order denying the petition must be more than a cursory recitation that the petition has been considered and denied; rather, there must be language in the order that in some way reflects that the state court "exerted its jurisdiction in such a way that the cases could have been brought here had the questions been raised prior to the original disposition." *Radio Station WOW*, 326 U.S. at 128; *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.15 (1982).

Wills does not demonstrate that his claim under *Penry* was properly presented to the Court of Criminal Appeals or that the state court actually passed upon it. In Texas, the general rule is that a defendant may seek rehearing only of issues that were presented prior to the appellate court's disposition of the case, unless the appellate court finds that the ends of justice require consideration of a new claim. *E.g., Rochelle v. State*, 791 S.W.2d 121, 124-25 (Tex. Crim. App. 1985). The Court of Criminal Appeals adhered to the general rule when it denied rehearing instead of affirmatively entertaining the belatedly injected claim.

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[2] In a footnote, the Court of Criminal Appeals noted that Wills had not raised a point of error under *Penry v. Lynaugh*, 492 U.S. 302 (1989), and had offered evidence of mental retardation only to establish that he did not understand his rights prior to giving his confession.

Indeed, Wills did not attempt to raise this claim until after the Court of Criminal Appeals decided his appeal, despite the fact that *Penry* was announced four years prior to the decision below.

Relying on *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982), and *Wood v. Georgia*, 450 U.S. 261 (1981), Wills argues that the Court should exercise certiorari jurisdiction over his *Penry* claim despite the fact that it was not properly raised in the court below. Both cases are inapposite. In *Eddings*, the Court did not purport to consider a constitutional question that had not been presented to the highest state court, but rather noted that, although Eddings had not relied on *Lockett v. Ohio*, 438 U.S. 586 (1978), in the court below, the "*Lockett* issue" was subsumed in Eddings challenge to his sentence. Further, Eddings did rely on *Lockett* in his petition for rehearing and the Oklahoma Court of Criminal Appeals expressly stated that it had been fully considered. In Wills' case, however, the Court of Criminal Appeals did not purport to address any state or federal constitutional challenge to Wills' sentence, because no such challenge was raised in a procedurally correct manner.

Wills' reliance on *Woods* is also misplaced. *Woods* is an extraordinary case presenting unique circumstances that compelled the Court's decision. The Court initially granted certiorari review of an equal protection challenge to the practice of imprisoning probationers who could not afford to pay installments on fines. *Id.* at 264. However, the record revealed an apparent and serious conflict of interest, repeatedly raised in state court by the prosecutor, between indigent criminal defendants--employees of an "adult" bookstore and theater--and the employer business entities that retained defense counsel. The employer had a strong economic incentive to pursue the equal protection issue, because a favorable ruling would allow it to discontinue a practice of paying fines assessed against its employees, and the entire conduct of state proceedings suggested that the defense

attorney abandoned the employees' interests to facilitate litigation of that question. By reversing on the basis of the apparent conflict, rather than on the question presented for review, the Court not only protected the rights of the hapless defendants, but also preserved its own integrity.

Wills' case presents nothing that even remotely approaches the complete breakdown of the adversary process that took place in *Wood*. Wills' counsel at trial and on appeal did not labor under a conflict of interest that might have caused them to forego the actual and proper presentation of a claim in the state courts. Accordingly, there is no reason for the Court to treat the second certiorari question as one fairly raised below, when in fact it was not.

Wills also claims that it violates the Eighth Amendment to execute a mentally retarded person who was a juvenile at the time of his trial. Wills expressly recognizes that this claim was not raised below. For the reasons delineated supra, it follows that Wills second claim is not a proper subject of the Court's certiorari jurisdiction.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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DAN MORALES
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February 25, 1994

The Honorable William K. Suter
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: *Bobby Joe Wills v. The State of Texas*, No. 93-6047

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

MARGARET PORTMAN GRIFFEY
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MPG/skw
Enclosures
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PROOF OF SERVICE

I hereby certify that on the 25th day of February, 1994, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Mr. Michael B. Charlton, Attorney at Laww, 550 Westcott, No. 320, Houston, Texas, 77007. All parties required to be served have been served. I am a member of the Bar of this Court.

Margaret Portman Griffey

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